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No. 00-348

IN THE

Supreme Court of the United States

ADVANCE LEASING AND DEVELOPMENT, INC., *et al.*,

Petitioners,

v.

CHRIS HART, *etc., et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS HILLSBOROUGH COUNTY, CHRIS HART AND JOSEPH CHILLURA

CHARLES W. PITTMAN
GORDON J. SCHIFF
ANDREW K. MACFARLANE
MACFARLANE FERGUSON
& MCMULLEN
2300 Park Tower
400 North Tampa Street
Tampa, Florida 33602
(813) 273-4200

HERBERT RAYMOND ALLEN, II*
Senior Assistant County Attorney
JULIA C. MANDELL
Assistant County Attorney
Office of the County Attorney
601 East Kennedy Boulevard
27th Floor
Tampa, Florida 33602
(813) 272-5670

Attorneys for Respondents Hillsborough County, Chris Hart and Joseph Chillura

* *Counsel of Record*

162604

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED BY PETITION

Whether *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999) eliminated the rational basis test so as to mandate the reversal of a summary judgment entered on Substantive Due Process, Equal Protection, and Due Process Takings claims brought pursuant to 42 U.S.C. § 1983, and to mandate a jury trial to consider the reasonableness of the local government's proffered justification in denying a DRI/Rezoning Application?

Whether *Del Monte Dunes* holds that there is a Due Process Takings claim cognizable under 42 U.S.C. § 1983, without the landowner first availing himself of a state postdeprivation remedy?

TABLE OF CONTENTS

	Page
Questions Presented by Petition	i
Table of Contents	ii
Table of Cited Authorities	iv
Statement of the Case	1
a. History of Petitioners' DRI and Rezoning Application	2
b. Challenges to County's 1989 Comprehensive Plan which relate to Petitioners' right to develop the Property	7
c. Statement of Federal Court Case	8
Summary of the Argument	10
Reasons for Denying the Writ of Certiorari	11
I. The Eleventh Circuit's Decision Does Not Conflict With *Del Monte Dunes*.	11
II. Contrary To *Del Monte Dunes*, The Eleventh Circuit Did Not Reach The Merits Of A Takings Claim In That Petitioners Conceded That Their Claim Was Not Ripe For Review.	12

Contents

Page

III. Petitioners' Claim That *Del Monte Dunes* Eliminated The Rational Basis Test Is Unfounded. 16

IV. *Del Monte Dunes* Does Not Conflict With Decisions Of The Eleventh Circuit Except On The Right To A Jury Trial In "Takings" Cases 17

V. *Del Monte Dunes* Does Not Alter Or Even Consider The Traditional Summary Judgment Standards And Summary Judgment Was Warranted Because Petitioners Failed To Establish Issues Of Material Fact In Their Claims For Substantive Due Process, And Equal Protection Which Are Unrelated To The Reasonableness Of The Denial Of Petitioners' DRI/Rezoning Application 20

Conclusion 22

TABLE OF CITED AUTHORITIES

Page

Cases:

Bannum, Inc. v. City of Fort Lauderdale, 157 F.3d 819 (11th Cir. 1998) 16

Buckles v. Kings County, 191 F.3d 1127 (3rd Cir. 1999) 20

City of Monterey v. Del Monte Dunes at Monterey, 526 U.S. 687 (1999) ..... *passim*

Federal Communications Commission v. Beach Communications, Inc., 508 U.S. 307, 113 S. Ct. 2096, 124 L. Ed. 2d. 211 (1993) 17

First English Evangelical Church of Glendale v. Los Angles County, 482 U.S. 304 (1987) 13

Haves v. City of Miami, 52 F.3d 918 (11th Cir. 1995) 16

John Corporation v. The City of Houston, 214 F.3d 573 (5th Cir. 2000) 19

Joint Ventures, Inc. v. Department of Transportation, 563 So. 2d 622 (Fla. 1990) 15

Layne & Bowler Corp. v. Western Well Works, Inc., 261 US 387, 43 S. Ct. 422 (1923) 12

Cited Authorities

Page

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 13

New Port Largo Inc. v. Monroe County, 95 F.3d 1048 (11th Cir. 1986) 11, 19

Reheard v. Lee County, 30 F.3d 1412 (11th Cir. 1994) 15

Restigouche, Inc. v. Town of Jupiter, 59 F.3d 1208 (11th Cir 1995) 16

Villas of Lake Jackson, Ltd. v. Leon County, 121 F.3d 610 (11th Cir. 1997) 13, 14, 19

Statutes:

42 U.S.C. § 1983 ..... i, 9, 10, 13, 18, 19, 20

Fla. Stat. § 163.3184(9)(b) 7

Fla. Stat. § 163.3184(10) 7

Fla. Stat. § 163.3184(10)(b) 7

Fla. Stat. § 163.3194(1)(a) 3

Fla. Stat. § 380.06 ..... 1, 5

Fla. Stat. § 380.06(1) 1

Cited Authorities

	Page
Fla. Stat. § 380.06(14)	1, 6
Fla. Stat. § 380.07	6
LDC § 2.7.5.11.1	2
United States Constitution:	
Seventh Amendment	18
Rule:	
Supreme Court Rule 10	11

STATEMENT OF THE CASE

Florida law requires that certain proposed developments, such as the super regional mall proposed by Petitioners, undergo local, regional and state review pursuant to the provisions of § 380.06, Fla. Stat., prior to the initiation of any development. These proposed developments, known as "developments of regional impact" or "DRIs," require local, regional and state approval because they "would have a substantial effect upon the health, safety, or welfare of citizens of more than one county" due to their "character, magnitude or location." § 380.06(1), Fla. Stat.

Under § 380.06(14), Fla. Stat., a proposed DRI may be approved, denied, or approved subject to conditions, restrictions or limitations, by a local government. One of the statutory factors local government is required to consider is whether and to what extent the proposed development: "is consistent with the local comprehensive plan and local land development regulations." § 380.06(14), Fla. Stat.

The local comprehensive plan under which Petitioners' proposed DRI was reviewed was the Future of Hillsborough County Comprehensive Plan for the time frame through 2010 ("the 1989 Comprehensive Plan"). Pursuant to the requirements of Chapter 163, part II, Fla. Stat., Hillsborough County (the "COUNTY") adopted the 1989 Comprehensive Plan on July 12, 1989, which included classifying the Petitioners' property as Regional Commercial ("RC"). The RC future land use category was the only land use category under the 1989 Comprehensive Plan which allowed for consideration of a maximum retail component in excess of 300,000 square feet of development.

Petitioners' proposed DRI project also required rezoning from Agricultural Residential ("AR") to Planned Development — Mixed Use ("PD-MU") under the Hillsborough County Land Development Code (1992, as amended) ("LDC"). The General Review Criteria for a PD zoning district under the LDC are: (1) physical characteristics of the site and relation to surrounding property; (2) the density or intensity of the proposed development in relation to the surrounding land uses and zoning; (3) the relation of the PD district to public utilities, facilities and services; (4) the relation of the PD district to major transportation facilities; (5) compatibility of the PD district; (6) provision for gradual changes in density or intensity; (7) internal/ external relationship. LDC § 2.7.5.11.1.

a. History of Petitioners' DRI and Rezoning Application

Petitioners, Peter A. Geraci and Roy N. Geraci, ("Geraci") own property located in Northwest Hillsborough County, at the northeast quadrant of the intersection of Dale Mabry Highway and Van Dyke Road. All property sought to be developed was owned by the Geracis and parts of the property were, at times, under contracts for sale to Forbes-Cohen Development Corporation ("Forbes-Cohen") and Advance Leasing and Development, Inc. ("ALD"). For many years the property has been used for cattle operations.

On October 17, 1988, Forbes-Cohen filed an Application for Development Approval of a Development of Regional Impact ("DRI ADA"), for 1.3 million square feet of retail development on 215 acres of the Geracis' property. Forbes-Cohen never obtained approval from the Tampa Bay Regional Planning Council ("TBRPC") and never sought any decision by the COUNTY on the DRI ADA. Forbes-Cohen

abandoned the project in late 1989. The project was dormant in 1990 and 1991. On February 28, 1992, Petitioner, ALD, filed an "Update" to the Forbes-Cohen DRI ADA for a proposed mall (DRI No. 192), consisting of 1.28 million square feet of retail development on 194 acres of the Geracis' property (the "DRI Parcel"). On January 21, 1993, ALD submitted to the COUNTY a rezoning application, including a General Development Plan dated July 21, 1992, requesting a zoning change from AR to PD-MU on the DRI Parcel for 1.28 million square feet of development (RZ 93-170).

In April 1993, a noticed public hearing on DRI No. 192 and RZ 93-170 was held before the Hillsborough County Zoning Hearing Master ("ZHM")[1]. The ZHM recommended denial of Petitioners DRI and Rezoning application based upon numerous concerns, including inconsistency with the 1989 Comprehensive Plan, as prohibited by § 163.3194(1)(a), Fla. Stat., and inconsistency with the applicable zoning law. On May 14, ALD submitted several modifications to RZ 93-170 including an approval to provide 80 acres of offsite upland mitigation. On June 11, 1993, COUNTY staff wrote Petitioners about staff's concerns that certain parcels owned by the Geracis adjacent to the proposed mall site were not part of the DRI/RZ applications. Staff recommended a coordinated rezoning. On June 23, 1993, the Geracis filed a separate rezoning application for forty-two (42) acres located adjacent to the DRI parcel and fronting on Van Dyke Road and Dale Mabry Highway (the "Outparcels"). The rezoning

1. The COUNTY uses a ZHM to conduct a public hearing on DRI/RZ applications, and to make findings of fact and recommendations. *See* LDC Division 2.7. The ZHM makes its recommendation to the Hillsborough County Board of County Commissioners, which has the sole power to make a final decision on the applications. *Id.*

application requested a rezoning from AR to Planned Development-Commercial ("PD-C"), for 235,000 square feet of office development. The rezoning application was in addition to the DRI/RZ application filed by ALD.

On June 29, 1993, the ZHM held a second noticed public hearing on DRI No. 192 and RZ 93-170. On July 14, 1993, the ZHM recommended denial based on numerous concerns, including inconsistency with the 1989 Comprehensive Plan and the applicable zoning law; the proposed parcelization of Outparcels; failure to address impacts on wildlife habitat, wetlands and transportation; and incompatibility.

On September 3, 1993, Petitioners combined RZ 93-170 (for the DRI Parcel) and RZ 93-332 (for the Outparcels) into consolidated RZ 93-170, which the Petitioners called a "unified plan" on 271 acres. In October 1993, Petitioners revised their General Development Plan (dated September 3, 1993/revised October 21, 1993) for 1.28 million square feet of development on the DRI Parcel and 235,000 square feet of office development on the Outparcels.

On November 2, 1993, the ZHM held a third noticed public hearing on DRI 192 and RZ 93-170, under the revised General Development Plan. On November 17, 1993, the ZHM recommended approval of a reduced level of development consisting of 697,000 square feet on the southern half of the property under consideration, along with ten (10) conditions and restrictions on the General Development Plan.

On November 30, 1993, Petitioners again amended DRI 192 and RZ 93-170 to reduce the proposed project to a "phased" project in which only Phase One, consisting of 880,000 square feet of development, would receive specific

DRI approval. Further, Petitioners proposed that no development would be approved on the Outparcels and future proposed development would be subject to further DRI review and public hearings by the COUNTY.

On December 16, 1993, the Hillsborough County Board of County Commissioners ("BOCC") held a public hearing on DRI 192 and RZ 93-170, as amended on November 30, 1993. The BOCC accepted the ZHM recommendations except that the development would encompass the entire 274 acres. The BOCC conditionally approved the development of 697,000 square feet of development on 274 acres, subject to the Petitioners' revision of the General Development Plan to address the ten (10) conditions, in the November 17, 1993 ZHM recommendation. Petitioners submitted a General Development Plan (dated January 21, 1994/revised February 11, 1994) for 697,000 square feet of development on 274 acres. However, Petitioners failed to comply with the conditional approval set forth by the BOCC at its December 16, 1993 hearing.

On March 29, 1994, the BOCC held a second public hearing on DRI No. 192 and RZ 93-170. At the hearing, Petitioners presented the February 11, 1994 revised General Development Plan for 697,000 square feet of development. The BOCC denied the applications because the Petitioners again failed to comply with 2 of the 10 conditions set by the BOCC at its December 16, 1994 hearing.

On April 26, 1994, the BOCC held a public meeting (not hearing) for the sole purpose of formally adopting a denial resolution based upon the motion adopted on March 29, 1994. In accordance with § 380.06, Fla. Stat. the BOCC adopted Resolution 94-0102, denying the DRI/RZ

applications but enumerating changes that would make the development eligible to receive approval, which included those conditions in the November 17, 1993 ZHM recommendation. Consistent with § 380.06(14), Fla. Stat., the BOCC set out its reasons for denial in Resolution 94-0102, including lack of environmental protection, inconsistency with the character of the community, incompatibility, noncompliance with the Comprehensive Plan and the LDC, and transportation impacts.

Petitioners challenged the DRI/RZ denial by filing an Appeal Petition with the Florida Land and Water Adjudicatory Commission ("FLWAC"), pursuant to § 380.07, Fla. Stat., in June 1994 (the "DRI Proceeding").[2] The DRI Proceeding was a *de novo* proceeding by FLWAC on the DRI/RZ applications under which the COUNTY's denial was not entitled to a presumption of correctness. On June 19, 1998, Petitioners voluntarily withdrew/dismissed the DRI Proceeding. FLWAC issued a Final Order of Dismissal on July 29, 1998.

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2. Petitioners also filed a petition in the Circuit Court for Hillsborough County, Florida, for a Writ of Certiorari to quash the COUNTY's denial of Petitioners' RZ application. The petition was dismissed as not timely filed, and that dismissal was upheld by the Florida Second District Court of Appeals in *Advance Leasing & Development, et al. v. Board of County Commissioners*, Case No. 95-2718. Further, Petitioners filed a petition for vested rights against the COUNTY's significant wildlife habitat ordinance and concurrency regulations, which was denied by a county land use hearing officer. Petitioners appealed the land use hearing officer's denial to the BOCC, which affirmed the decision. The Hillsborough County Circuit Court denied Petitioners' Petition for Writ of Certiorari in *Advance Leasing & Development, et al. v. Hillsborough County*, Case No. 97-8568-A (R7-181-12) on August 24, 1998, finding that Petitioners had no vested rights. The Florida Second District Court of appeals also denied Petitioners' petition for Writ of Certiorari in Case No. 98-03651 on January 26, 1999.

b. Challenges to County's 1989 Comprehensive Plan which relate to Petitioners' right to develop the Property

On September 20, 1989, the Florida Department of Community Affairs filed a petition challenging the 1989 Comprehensive Plan of Hillsborough County as not in compliance, pursuant to § 163.3184(10), Fla. Stat., based in part upon the lack of appropriate data and analysis to support densities and intensities in the 1989 Comprehensive Plan. In this administrative proceeding a Recommended Order was entered which included the conclusion of law that the Comprehensive Plan's levels of densities and intensities in Northwest Hillsborough County were not supportable by data and analysis. The Geraci property was included within the area which was the subject of the administrative proceeding.

The Recommended Order was forwarded to the Florida Administration Commission ("FAC"), consisting of the Governor and Cabinet for final agency action. §§ 163.3184(9)(b) and (10)(b), Fla. Stat. The FAC entered its Final Order on December 16, 1993 ("the Final Order"). The Final Order recommended the following remedial actions for Area 3(c), which includes the Geracis' property: "the three (3) outparcels along Dale Mabry Highway and Van Dyke Road currently designated RC will be designated Commercial Office ("CO") . . . [and t]he main area currently designated RC with a FAR of 1.0 will be amended to designation of Urban Mixed Use* ("UMU*")." The Final Order found that the RC classification was not supportable by relevant and appropriate data and analysis, but the recommended remedial action was for guidance only.

The Final Order returned the Comprehensive Plan to the COUNTY for public hearings and a determination of appropriate land use classifications. The Planning Commission

recommended and the BOCC adopted by Ordinance No. 94-10 amendments, to the Future Land Use Map ("FLUM"), which changed the land use classification on 253 acres of the Geracis' property (including the DRI Parcel) from RC to CMU-12. The CMU-12 classification allows for consideration of development with up to a 0.5 FAR of which up to 650,000 square feet could be retail uses. On October 27, 1994, after additional hearings, the BOCC adopted CMU-12 for the Geracis' property.

The FAC retained jurisdiction to determine compliance of the COUNTY's Comprehensive Plan after the adoption of remedial amendments. On February 24, 1998, Petitioners filed a Notice of Violation of Agency Action with the FAC, alleging that the COUNTY's legislative action, which changed the land use classification on Petitioners' property, had violated the Final Order. On April 16, 1998, the Administration Commission issued a determination that the COUNTY acted consistent with the Final Order.

c. Statement of Federal Court Case

On January 13, 1995, Petitioners served its initial Complaint on the Defendants.[3] On August 21, 1995,

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3. Defendants are the COUNTY through its individual Commissioners serving on the Board of County Commissioners, the Secretary of the Department of Community Affairs for the State of Florida, and Jan Smith, individually and a member of the Hillsborough County Planning Commission. During the case there have been three Secretaries of the Department of Community Affairs-originally Linda Shelly was served, then replaced by James F. Murley, and currently this office is held by Steven S. Seibert. Jan Smith was voluntarily dismissed as a party from the case on June 4, 1998.

Petitioners filed an Eight Count Amended Complaint in which they claimed that the COUNTY improperly refused to grant rezoning and DRI development approval to enable them to construct a super regional mall and thereafter, with the approval of the Florida Department of Community Affairs, improperly down-planned their property in an amendment to Hillsborough County's Comprehensive Plan. In six Counts of the Amended Complaint Petitioners sought relief under 42 U.S.C. § 1983: Count I alleged an arbitrary and capricious due process claim, Count II alleged an equal protection claim that Petitioners were treated differently from other similarly situated landowners, Count IV alleged a due process takings claim, Count V alleged an impairment of contract claim, Count VI alleged a procedural due process violation, and Count VIII alleged a claim for preliminary and permanent injunctive relief. The Amended Complaint also contained State law claims. Count III alleged a claim for equitable estoppel and Count VII alleged a claim for specific performance. After three years in which the parties engaged in extensive discovery, on September 21, 1998, the District Court for the Middle District of Florida granted the Motions for Summary Judgment filed by the COUNTY and the Florida Department of Community Affairs on the § 1983 Counts and dismissed the State law Counts. On September 22, 1998, the District Court entered the Final Judgment against Petitioners. (App. B, Petitioners Petition for Writ of Certiorari).

On October 19, 1998, Petitioners filed a Notice of Appeal with the Middle District Court for Florida. On May 19, 2000, the Eleventh Circuit Court of Appeals affirmed the judgment entered by the Middle District Court of Florida. (App. A, Petitioners Petition for Writ of Certiorari). After Petitioners requested rehearing en banc on June 7, 2000, the Eleventh Circuit denied rehearing en banc on July 24, 2000. On August 8, 2000, the Eleventh Circuit Court of Appeals granted Petitioners' Motion for Stay of the Mandate.

SUMMARY OF ARGUMENT

The decision by the Eleventh Circuit does not conflict with *Del Monte Dunes* or any other Federal appellate decision. The Eleventh Circuit's decision does not recite any facts or evidence and does not discuss legal principles. The Eleventh Circuit simply identified the issues which were presented on Respondents' Motion for Summary Judgment and affirmed the District Court's determination that Respondents were entitled to summary judgment.

The case before the Eleventh Circuit and the case decided by this Court in *Del Monte Dunes* deal with different subject matter. The issue before this Court in *Del Monte Dunes* was whether a landowner was entitled to a jury trial in a *takings* case. In the instant case, the Eleventh Circuit did not review a takings claim because Petitioners had not pursued to completion the postdeprivation remedy available to them in Florida. Therefore, Petitioners' takings claim was unripe. In *Del Monte Dunes* this Court noted that a takings claim under § 1983 had been allowed because California did not provide a postdeprivation remedy for the taking.

Petitioners contend that *Del Monte Dunes* eliminated the rational basis test which is used to determine whether governmental action is reasonably related to the achievement of some legitimate government purpose. The person asserting substantive due process or equal protection violations has the burden to negate every conceivable basis which might support the governmental action. There is not even a hint in *Del Monte Dunes* that this Court intended to eliminate or modify the rational basis test.

Whether *Del Monte Dunes* conflicts with decisions of the Eleventh Circuit other than the instant case is irrelevant. The only conflict between *Del Monte Dunes* and Eleventh Circuit cases is that in *New Port Largo, Inc. v. Monroe County*, 95 F.3d 1048 (11th Cir. 1986), the Eleventh Circuit held that a landowner was not entitled to a jury trial in a regulatory takings case.

There is nothing in *Del Monte Dunes* to suggest there has been any alteration of summary judgment standards. Petitioners were not entitled to either a bench or jury trial because Respondents were entitled to judgment as a matter of law.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I.

THE ELEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH *DEL MONTE DUNES*.

The decision by the Eleventh Circuit identifies this as a land-use controversy and specifies five issues. The Eleventh Circuit then concluded that there was no error in granting summary judgment for Defendants (Respondents). The Eleventh Circuit's decision does not recite any evidence or discuss any principle of law. Petitioners impute rulings and positions to the Eleventh Circuit which are not part of the written decision and that cannot even be inferred.

Supreme Court Rule 10 provides in part: "A petition for a writ of certiorari will be granted only for compelling

reasons." One possible reason would be that the Eleventh Circuit "has entered a decision in conflict with the decision of" this Court. There is simply nothing in the Eleventh Circuit's decision that shows any conflict with any court. In *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 43 S. Ct. 422 (1923), this Court said

> . . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a *real and embarrassing conflict of opinion and authority* between the Circuit Courts of Appeals. *Id* at 393. (Emphasis added.)

The Eleventh Circuit, in the instant case, has said nothing to create any kind of conflict.

II.

CONTRARY TO *DEL MONTE DUNES*, THE ELEVENTH CIRCUIT DID NOT REACH THE MERITS OF A TAKINGS CLAIM IN THAT PETITIONERS CONCEDED THAT THEIR CLAIM WAS NOT RIPE FOR REVIEW.

In *City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687 (1999), this Court dealt with the *type* of trial to be held in a "takings case." The Eleventh Circuit, in the instant case, found summary judgment was proper. In *Del Monte Dunes*, this Court considered the right to jury trial on a "takings claim." If Petitioners did have a valid "takings claim," that claim would not be ripe for review in that Petitioners were not denied a post deprivation remedy in this cause.

In *Del Monte Dunes*, this Court reviewed whether a landowner was entitled to a jury trial as afforded by the Seventh Amendment on damage and liability issues arising from an uncompensated regulatory taking by the City. A claim under 42 U.S.C. § 1983 was allowed "because the State of California had not provided a compensatory remedy for temporary regulatory takings." 526 U.S. at 699. In *Del Monte Dunes* this Court did not review Substantive Due Process claims, Equal Protection claims, Procedural Due Process claims, standards for summary judgment, or a challenge to the jury instructions.

By contrast, the Eleventh Circuit did not reach the merits of the Petitioners Due Process Takings claim. The District Court noted in its Order that:

> Plaintiffs concede that their due process taking claim is no longer viable in light of *Villas of Lake Jackson, Ltd. v. Leon County*, 121 F.3d 610, 612 (11th Cir. 1997).

In *Villas* the Eleventh Circuit held that "[t]here is no substantive due process 'takings' claim that would protect the specific property right not already protected by the Takings Clause." 121 F.3d at 615. To reach this result the Eleventh Circuit relied upon *First English Evangelical Church of Glendale v. Los Angles County*, 482 U.S. 304 (1987), and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), to find that a non-physical takings claim is properly redressed by only the Just Compensation Clause. Thus, the Eleventh Circuit in *Villas* determined, prior to this Court's decision in *Del Monte Dunes*, that

> . . . [r]ecent Supreme Court "takings" jurisprudence and the well established contours of substantive due process law dictate that if a challenge to a "regulatory

> taking" states a claim upon which relief may be granted at all, it is a cause of action under the Takings Clause, subject to the ripeness prerequisite of exhaustion of the state-court inverse condemnation remedy. *Villas*, 121 F.3d at 612.

The import of *Villas* is that there is no "unconstitutional taking" until the landowner has been denied just compensation, which principle was expressly described in *Del Monte Dunes*. This Court recognized that

> The constitutional injury alleged, therefore, is not that property was taken but that it was taken without just compensation. Had the City paid for the property or had an adequate postdeprivation remedy been available, Del Monte Dunes would have suffered no constitutional injury from the taking alone. *Del Monte Dunes*, 526 U.S. at 710.

Petitioner, in the case at bar, has not suffered a "constitutional injury" even if there was a taking because there is a postdeprivation remedy available in Florida. Petitioners have not availed themselves of this postdeprivation remedy, and therefore, Petitioners had no claim for unconstitutional taking to be presented to the Eleventh Circuit. Petitioners acknowledged in the record before the District Court that they had failed to pursue to completion their postdeprivation remedy:

> [REQUEST] 63. No Plaintiff has pursued to completion any inverse condemnation claim based upon any alleged taking by HILLSBOROUGH COUNTY, FLORIDA.

> [RESPONSE] 63. Denied, in that the Plaintiffs have filed, and are pursuing to completion an inverse condemnation claim in state Court based upon an alleged taking by Hillsborough County, Florida, without just compensation pursuant to the Florida Constitution. That matter is pending and will be pursued to completion. It is admitted that Plaintiffs have not pursued to completion any inverse condemnation takings claim based upon the Fifth Amendment to the United States Constitution, as that claim will not be ripe for adjudication by the United States District Court until such time as Plaintiffs have pursued to completion their inverse condemnation claim based upon the Florida Constitution.

(Amended Response to Request for Admissions served March 16, 1998) (DKT 236).

The lawsuit referred to in response to request number 63 was not filed until about November 19, 1997, or more than two years after the Complaint was filed in the District Court. Florida provides an adequate postdeprivation remedy. *See, e.g., Reheard v. Lee County*, 30 F.3d 1412, 1417 (11th Cir. 1994) (Florida has allowed an action for inverse condemnation for a temporary taking since 1990), *citing to Joint Ventures, Inc. v. Department of Transportation*, 563 So. 2d 622 (Fla. 1990). Thus, *Del Monte Dunes* is legally distinguishable from the case at bar because Petitioners have no takings claim in that Florida provides an adequate postdeprivation remedy, and because Petitioners could not create a genuine issue of fact to warrant a trial.

III.

PETITIONERS' CLAIM THAT *DEL MONTE DUNES* ELIMINATED THE RATIONAL BASIS TEST IS UNFOUNDED.

In their Point I, Petitioners' claim that *Del Monte Dunes* "limited the District Court's deference in examining land-use denials in a manner that fundamentally conflicts with the 'hypothetically possible' precedent established in the Eleventh Circuit (and others) and applied in this case." (Petitioners Petition for Writ of Certiorari at p. 9). What Petitioners' are calling the "hypothetically possible" precedent is customarily referred to as the "rational basis" test. The decision of the Eleventh Circuit in the instant case says nothing about any test whatsoever.

The rational basis test is applied generally in evaluating Substantive Due Process/Arbitrary and Capricious claims, and Equal Protection claims. The rational basis test holds that the governmental agency is entitled to prevail on these claims if its action is reasonably related to the achievement of some legitimate governmental purpose. The person challenging the governmental action has the burden to negate every conceivable basis which might support the governmental action. Petitioners argue that *Del Monte Dunes* "has discredited this impermissibly deferential standard imposed by the Eleventh Circuit" in *Bannum, Inc. v. City of Fort Lauderdale*, 157 F.3d 819 (11th Cir. 1998), *Haves v. City of Miami*, 52 F.3d 918 (11th Cir. 1995). *Restigouche, Inc. v. Town of Jupiter*, 59 F.3d 1208, 1211 (11th Cir 1995) (Petition for Writ of Certiorari at p. 12).

These Eleventh Circuit cases are following faithfully the pronouncements of this Court, including *Federal Communications Commission v. Beach Communications, Inc.*, 508 U.S. 307, 113 S. Ct. 2096, 124 L. Ed. 2d. 211 (1993), which held that "those attacking the rationality of the legislative classification have the burden to negate every conceivable basis which might support it." 508 U.S. at 314.

There is no suggestion whatsoever in *Del Monte Dunes* that the rational basis test was supplanted or even changed, and such a change cannot be inferred. The rational basis test is well established in most, if not all, Circuits. Certainly there was no intent by this Court to eliminate the rational basis test and substitute in its place the proposition that the reasonableness of governmental action must always be presented to a jury. In *Del Monte Dunes*, the City had sponsored the jury instructions, the jury instructions were never challenged, and the propriety of the jury instructions were not considered by this Court. *See Del Monte Dunes*, 526 U.S. at 704.

IV.

DEL MONTE DUNES DOES NOT CONFLICT WITH DECISIONS OF THE ELEVENTH CIRCUIT EXCEPT ON THE RIGHT TO A JURY TRIAL IN "TAKINGS" CASES

Respondents submit that the only Eleventh Circuit decision that is relevant on this Petition is the decision rendered in this case. The question is not whether some other decision of the Eleventh Circuit might be in conflict with *Del Monte Dunes*.

The Posture of Del Monte Dunes in This Court: As considered by this Court, *Del Monte Dunes* was a claim pursuant to 42 U.S.C. § 1983 that the City's action constituted an uncompensated regulatory taking in violation of the Takings Clause. The District Court had afforded the landowner a jury trial on the issues of liability and damages on the claim of an uncompensated regulatory taking.[4] The case was under § 1983 "because the State of California had not provided a compensatory remedy for temporary regulatory takings." 526 U.S. at 698.

Issues Decided By This Court in Del Monte Dunes: The first issue was whether a § 1983 suit seeking legal relief is an action at law within the meaning of the Seventh Amendment. This court held that it was and that the Plaintiff was entitled to a trial by jury.

The second issue was to "determine whether the particular issues of liability were proper for determination by the jury." 526 U.S. at 718. The Court held "that the issue whether a landowner has been deprived of all economically viable use of its property is predominantly a factual question" for the jury. 526 U.S. at 720. Also, this Court considered the "jury's role in determining whether a land-use decision substantially advances legitimate public interest *within the meaning of our regulatory takings doctrine*." (Emphasis added.) 526 U.S. at 720. The Court noted that this presented a more difficult question. The important items here are that this issue was presented "within the meaning of our regulatory takings doctrine," and within the particular context and circumstances of the case.

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4. The District Court decided Del Monte Dunes' Substantive Due Process claim without submitting it to a jury.

In *Del Monte Dunes* this Court did not deal with:

1. Substantive Due Process claims.
2. Equal Protection claims.
3. Procedural Due Process claims.
4. Standards for summary judgment.
5. Propriety of jury instructions.

Respondents concede that *Del Monte Dunes* conflicts with *New Port Largo Inc. v. Monroe County*, 95 F.3d 1048 (11th Cir. 1986), with regard to whether a landowner is entitled to a jury trial as opposed to a bench trial in a regulatory takings case. In the instant case, Petitioners were not entitled to a trial of any kind because Respondents were entitled to summary judgment. The conflict between *Del Monte Dunes* and *New Port Largo* is irrelevant to the Petition and to the decision of the Eleventh Circuit in the instant case. Petitioners may not use conflicts unrelated to the instant case to create conflict jurisdiction.

Petitioners assert that the Fifth Circuit in *John Corporation v. The City of Houston*, 214 F.3d 573 (5th Cir. 2000), rejected the Eleventh Circuit's position on takings cases (Petitioners' Petition for Writ of Certiorari at p. 20). Petitioners are incorrect. *Villas* did not hold that *all* Substantive Due Process claims are subsumed by the Takings Clause. *John Corporation* is consistent with *Villas*. *John Corporation* held that a landowner could not bring a § 1983 takings claim and bypass an available state postdeprivation remedy because the Takings Clause is only violated when just compensation has been denied. All of John Corporation's takings claims were dismissed as "unripe" for this reason. The Fifth Circuit noted that some Circuits hold that the Takings Clause subsumes all Substantive Due Process claims relating to deprivation of property.

In the instant case, Respondents did not contend on summary judgment and the District Court did not hold that the Takings Clause subsumed Petitioners' Substantive Due Process/ Arbitrary and Capricious, Equal Protection or Procedural Due Process claims. Moreover, only Petitioners' takings claim was deemed unripe; all other § 1983 claims were deemed ripe and were considered on their merits.

V.

DEL MONTE DUNES DOES NOT ALTER OR EVEN CONSIDER THE TRADITIONAL SUMMARY JUDGMENT STANDARDS AND SUMMARY JUDGMENT WAS WARRANTED BECAUSE PETITIONERS FAILED TO ESTABLISH ISSUES OF MATERIAL FACT IN THEIR CLAIMS FOR SUBSTANTIVE DUE PROCESS, AND EQUAL PROTECTION WHICH ARE UNRELATED TO THE REASONABLENESS OF THE DENIAL OF PETITIONERS' DRI/REZONING APPLICATION

Petitioners assert that *Del Monte Dunes* affirms "the right of each citizen to a jury trial to review the merits of a land use denial." (Petitioners Petition for Writ of Certiorari at pp. 9-10) Under this argument, *Del Monte Dunes* would nullify long-standing summary judgment principles and always require a jury trial to determine whether the government's action had a rational basis. This argument is meritless, as reasoned by the Third Circuit in *Buckles v. Kings County*, 191 F.3d 1127, 1141 (3rd Cir. 1999) since *Del Monte Dunes* did not alter or even consider the traditional summary judgment principles.

Summary judgment was warranted on the Substantive Due Process and on the Equal Protection claims on grounds not set forth in the Petition for Writ of Certiorari. Regardless

of the reasonableness of the government's proffered justifications, summary judgment for Respondents would still be required on each of these claims. As determined in the District Court's Order, the claim for Substantive Due Process was deficient because the Plaintiffs lacked a vested property interest to support this claim since the Plaintiffs did not have "a vested right to the redesignation of their property, under an estoppel or any other theory." Similarly, the Equal Protection claim was deficient since the "[p]laintiffs have not provided a single instance in which a similarly situated claim was treated differently," and Plaintiffs "fail to explain how projects referenced in the record were similarly situated to that of Plaintiffs." Finally, as noted above, any takings claim could not be entertained by the District Court because Petitioners have not pursued to completion their Florida postdeprivation remedy. Summary judgment for respondents was proper notwithstanding Petitioners' interpretation that *Del Monte Dunes* eliminated the rational basis test.

CONCLUSION

This Court should deny Petitioners' Petition for Writ of Certiorari because Petitioners have failed to present an important question to this Court which this Court must decide. Petitioners have misconstrued the decision of the Eleventh Circuit Court of Appeals in this matter and have misinterpreted this Court's decision in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999). After a review of the decision of the Middle District Court of Florida, which was upheld by the Eleventh Circuit Court of Appeals, it is clear that the lower courts committed no error in granting summary judgement against Petitioners. Further, the Eleventh Circuit Court of Appeals decision is not in conflict with this Court's decision in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999). Therefore, this Court should determine that Petitioners have not presented a compelling question.

Petitioner's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

CHARLES W. PITTMAN
GORDON J. SCHIFF
ANDREW K. MACFARLANE
MACFARLANE FERGUSON
& MCMULLEN
2300 Park Tower
400 North Tampa Street
Tampa, Florida 33602
(813) 273-4200

HERBERT RAYMOND ALLEN, II*
Senior Assistant County Attorney
JULIA C. MANDELL
Assistant County Attorney
Office of the County Attorney
601 East Kennedy Boulevard
27th Floor
Tampa, Florida 33602
(813) 272-5670

Attorneys for Respondents Hillsborough County, Chris Hart and Joseph Chillura